

<b>MARTIN PORTILLO</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 220,294
<b>CARL COLE MASONRY a/k/a</b>	)	
<b>COLE'S MASONRY</b>	)	
Respondent	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

... we conclude the Board's finding of zero [percent] task loss must be set aside and the proceeding remanded for further consideration of the Board. *Upon remand, the Board as factfinder [sic] must consider not only the work tasks not reported but the work tasks that were reported to the consultant.* Then the Board may reconsider the weight to be given to Dr. Drazek's

opinion and decide to what extent Portillo has lost his ability to perform work tasks as called for under K.S.A. 44-510e(a). (Emphasis added.)

The only issues before the Board on this remand are:

1. To what extent has claimant lost the ability to perform the work tasks that he performed in any substantial and gainful employment during the 15-year period preceding the December 7, 1996 accident?
2. What is claimant's permanent partial general disability rating?

Claimant contends the omitted jobs were only temporary jobs and, therefore, should not be considered as substantial, gainful employment. Claimant also contends that the physical activities required by the work tasks composing the omitted jobs are similar to the reported work tasks and, therefore, should not be considered in determining the task loss. Claimant requests the Board to find a 96 percent task loss based upon Dr. Jane K. Drazek's uncontroverted testimony.

The Workers Compensation Fund (Fund) requests the Board to find that claimant failed to prove the extent of his task loss or, in the alternative, to give Dr. Drazek's task loss opinion no weight. In its brief to the Board, the Fund states that Dr. Drazek provided the only task loss opinion in the record.<sup>1</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes:

1. The Board's February 29, 2000 Order should be modified to award claimant a 68 percent permanent partial general disability.
2. Permanent partial general disability is determined by averaging a worker's task loss with the worker's pre- and post-injury wage loss.

. . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the

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<sup>1</sup> See page two of the Kansas Workers Compensation Fund's Brief on Remand to the Appeals Board. But see Dr. Pedro A. Murati's August 31, 1998 deposition, page 31, where the doctor indicates claimant has a 96 percent task loss upon reviewing the same task list that Dr. Drazek reviewed.

injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . .<sup>2</sup>

3. The Court of Appeals has determined that the Board disregarded uncontroverted, relevant evidence from Dr. Jane K. Drazek in determining that claimant had failed to prove the extent of his task loss. Dr. Drazek reviewed the list of work tasks prepared at claimant's request by rehabilitation consultant Diana Joseph, who identified 28 separate work tasks that claimant had performed during the 15-year period before the December 7, 1996 accident. Dr. Drazek reviewed each listed task and indicated that claimant should no longer perform 27 of the 28 tasks, which equates to a 96 percent task loss. Ms. Joseph, however, did not know about several of claimant's former jobs and, therefore, did not break those jobs down into their separate work tasks. Because of this, the Board found Dr. Drazek's opinion lacked foundation, was untrustworthy and should, therefore, be disregarded. The Court of Appeals has determined that Dr. Drazek's opinion must not be disregarded.

4. As indicated in the above-quoted statute, task loss must be proven through a physician. The only physicians to provide a task loss opinion were Dr. Drazek and Dr. Pedro A. Murati, who also relied upon the task list generated by Ms. Joseph to conclude that claimant had lost the ability to do 27 of the 28 former work tasks. In its decision, the Court of Appeals has stated that the evidence is uncontroverted regarding claimant's ability to perform the 28 work tasks identified by Ms. Joseph. The Court stated:

. . . To reach its negative finding, the Board only considered the fact of Portillo's failure to report five or six work tasks [jobs]<sup>3</sup> to the rehabilitation consultant and totally disregarded the uncontroverted evidence of 28 work tasks that were reported. In effect, the Board omitted uncontroverted, relevant evidence to arrive at its faulty conclusion that Portillo failed to provide evidence of task loss.

Because the Court of Appeals has determined that the task loss opinion is uncontroverted, relevant evidence, the task loss opinion provided by Doctors Drazek and Murati is adopted by the Board. There is no contrary evidence in the record. Therefore, the Board finds and concludes that claimant has a 96 percent task loss due to the December 7, 1996 accident.

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<sup>2</sup> K.S.A. 1996 Supp. 44-510e.

<sup>3</sup> The Board found that claimant's task list omitted several jobs. The number of tasks composing those jobs is not in the record.

The Board is mindful that the Court of Appeals stated the Board on remand “must consider . . . the work tasks not reported” along with the tasks reported to the rehabilitation consultant. But the Board is unable to consider the omitted jobs in determining task loss because the record fails to disclose the work tasks included in those jobs. As used in the Workers Compensation Act, “work tasks” implies specific duties or specific acts that constitute the worker’s job.<sup>4</sup> To effectively break a job down into separate work tasks, one should consider the essential functions of the job and the physical requirements of each task.

5. In its February 29, 2000 Order, the Board found that claimant had a 39 percent wage loss. That conclusion was based upon the findings that claimant had a pre-injury wage of \$360 per week and an imputed post-injury wage of \$220 per week. Averaging claimant’s 96 percent task loss with the 39 percent wage loss, the Board concludes that claimant has sustained a 68 percent permanent partial general disability due to the December 1996 accident.

6. The Board incorporates the findings and conclusions from its February 29, 2000 Order that are not inconsistent with the above.

### **AWARD**

**WHEREFORE**, the Board modifies its February 29, 2000 Order and awards claimant a 68 percent permanent partial general disability.

Martin Portillo is granted compensation from the Workers Compensation Fund for a December 7, 1996 accident and resulting disability. Based upon an average weekly wage of \$360, Mr. Portillo is entitled to receive 45 weeks of temporary total disability benefits at \$240.01 per week, or \$10,800.45, plus 261.80 weeks of permanent partial disability benefits at \$240.01 per week, or \$62,834.62, for a 68 percent permanent partial general disability, making a total award of \$73,635.07.

As of July 20, 2001, there is due and owing to the claimant 45 weeks of temporary total disability compensation at \$240.01 per week, or \$10,800.45, plus 195.86 weeks of permanent partial general disability compensation at \$240.01 per week, or \$47,008.36, for a total due and owing of \$57,808.81, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$15,826.26 shall be paid at \$240.01 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in its February 29, 2000 Order that are not inconsistent with the above.

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<sup>4</sup> See K.S.A. 1996 Supp. 44-510e.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
Christopher J. McCurdy, Overland Park, KS  
Douglas D. Johnson, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director